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NAVIS SHIM LEE HIONG

v.

ALLIANZ GENERAL INSURANCE MALAYSIA BHD

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HIGH COURT SABAH & SARAWAK, KUCHING
ABDUL AZIZ ABDUL RAHIM J
[CIVIL APPEAL NO: 12-32-2007-II]
4 DECEMBER 2008

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CIVIL PROCEDURE: *Appeal - Appeal from Sessions Court to High Court - Exercise of discretion by trial judge - Whether evidence conclusive and cannot be questioned by appellate court*

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EVIDENCE: *Admissibility - Theft of car - Loss adjuster's report - Whether loss adjuster's report and valuation letter wrongly admitted into evidence - Basis for estimated market value - Failure of trial judge to appreciate car was not physically examined and basis for comparison not stated*

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INSURANCE: *Motor Insurance - Claims - Theft of car - Market value of car at time it was stolen - Whether insured value could be market value*

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The appellant plaintiff was the registered owner of a Volvo 850E(A) ("the car"). The respondent defendant were the insurers of the car under a comprehensive motor insurance policy for a value of RM120,000 from 17 September 2000 to 16 September 2001. On 13 September 2001, the plaintiff renewed the policy with the defendant for the same value. The car was stolen on 14 September 2001. Theft was one of the situations covered by the policy. The plaintiff obtained summary judgment against the defendant who duly appealed to the High Court. Pending disposal of the defendant's appeal, the plaintiff enforced the summary judgment and the defendant paid the plaintiff. The defendant later counterclaimed from the plaintiff the refund of a surplus it had paid. The Sessions Court entered judgment in favour of the defendant on the counterclaim and the plaintiff appealed to the High Court. The main issue was what the market value of the car was on the day it was stolen. The respondent contended that the sum insured was not the market value of the car and produced the loss adjuster's final report (the "report") stating RM94,000 as the market value and a valuation letter from Federal Auto Sdn Bhd (the "valuation letter") estimating value in the range of RM90,000 to RM95,000. The plaintiff maintained that the sum insured of RM120,000 was agreed

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between the parties as the market value of the car at the renewal of the insurance policy and upon which the premium was determined. The plaintiff also contended that the report and the valuation letter were wrongly admitted into evidence as they were not based on the personal knowledge of the maker or physical inspection of the car.

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Held (allowing the appeal):

(1) The evidence of the market value of the car must be seen in the light of the evidence by the plaintiff's witnesses who had seen the car before it was stolen and also test driven it such that PW1 was willing to buy the car at RM120,000. PW1's evidence that she was willing to buy the car for RM120,000 was to be preferred to the report and valuation letter because the makers did not have the advantage of seeing the car physically to assess its condition in determining its market value. It was therefore mere conjecture and opinion. (para 35)

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(2) Although the Sessions Court Judge had exercised her discretion to admit the report as evidence of market value of the car as well as the valuation letter and the appellate court normally does not interfere with the exercise of discretion unless such exercise is found to be unsupported by facts and circumstances of the case or is wrong in law or unreasonable, it did not mean that such evidence was conclusive and the reliance on it by the trial court could not be questioned by the appellate court. The appellate court may review the evidence and disagree with the trial judge as to its probative value. (para 33)

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(3) Although the insurance policy in this case was not a valued policy, it did not mean that the insured value could not be the market value if there was evidence to support it. RM120,000 was evidence of a value by a willing buyer and seller trading at arm's length. Therefore, the market value of the car when it was stolen was RM120,000. (para 36)

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Case(s) referred to:

Allianz General Insurance Malaysia Bhd v. Navis Shim Lee Hiong [2003] 8 CLJ 22 HC (*refd*)

Calderbank v. Calderbank [1975] 3 All ER 333 (*refd*)

Mahmod Kailan v. Goh Seng Choon & Anor [1976] 1 LNS 68 FC (*refd*)

Malaysia National Insurance Sdn Bhd v. Abdul Aziz Mohamed Daud [1978] 1 LNS 117 FC (*refd*)

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New Zealand Insurance Co Ltd v. Ong Choon Lin [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230 SC (*refd*)

- A *Thrimalai Palamiappan & Anor v. Mohamed Masry Tukimin* [1986] 1 CLJ 347; [1986] CLJ (Rep) 756 (**refd**)
Vasudevan Vazhappulli Raman v. T Damodaran PV Raman & Anor [1981] CLJ 84; [1981] CLJ (Rep) 101 FC (**refd**)

Legislation referred to:

- B Evidence Act 1950, ss. 101, 102, 103

For the appellant - Kilat Beriak; M/s Chew Jugah Wan Ullok & Co

For the respondent - Sabwati Balia; M/s Reddi & Co

- C *Reported by Susheila Sreedharan*

JUDGMENT

- D **Abdul Aziz Abdul Rahim J:**

Introduction

[1] Appellant (refer to as plaintiff) was the registered owner of a Volvo 850E(A) bearing registration No. QKH 7362 (“the car”).

- E [2] Respondent (refer to as defendant) were the insurers of the car under a comprehensive motor insurance policy No. 00VSM002937 (“the policy”) for a value of RM120,000.00 as agreed by both parties for the period from 17 September 2000 to 16 September 2001.

- F [3] On 13 September 2001, in view of the policy expiring soon, the plaintiff obtained a motor insurance cover note No. SMC0012893 (“the cover note”) with the defendant on the car for same value.

- G [4] The next day, 14 September 2001 the car was stolen and the theft was duly reported to the police by the plaintiff and by the defendant.

- H [5] As the loss of the car due to theft was covered by the policy, the defendant initially offered to pay RM88,000, after deducting policy excess of RM1200. But plaintiff rejected the offer. The defendant then revised its offer to RM93000, again after deducting the policy excess.

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[6] The plaintiff did not reject the offer; but requested the defendant to make payment of the offered amount and leave the issue of the balance of the insured agreed market value for the loss of the car to be determined by the court. However the defendant refused.

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[7] The plaintiff thus claimed the insured value of the car in the sum of RM120,000. After the filing of the action, and before the defence was filed the plaintiff applied for summary judgment and was allowed. Judgment was entered against the defendant for RM118,800 (after deducting RM1,200 policy excess) summarily. The defendant has appealed against that decision. However, pending the hearing of the defendant's appeal to the High Court against the order of summary judgment, the plaintiff sought to enforce the summary judgment and the defendant paid the plaintiff a sum of RM131,688.98 being the judgment sum with interest up to 20 January 2003 without prejudice basis.

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[8] Eventually however the High Court allowed the defendant's appeal (See *Allianz General Insurance Malaysia Bhd v. Navis Shim Lee Hiong* [2003] 8 CLJ 22); and remitted the case back to the Sessions Court to determine the market value of the car at the time of loss. The High Court also ruled that the insurance policy in this case was not a valued policy. This fact also not disputed by the plaintiff in the present appeal.

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[9] A minor digression at this point is necessary. Following the High Court's decision in allowing its appeal, the defendant filed a notice of application to amend the defence and to include a counterclaim for the refund of RM37,888 as surplus paid to the plaintiff. At the trial of this case on the issue of the market value of the application was heard and allowed and judgment was entered on the counterclaim in favour of the defendant with interest from the date of judgment ie, 16 November 2007 until full and final settlement with no order as to cost. The plaintiff now appeals against the decision.

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[10] The plaintiff counsel, in preparing the appeal record had included the application and all the related documents. At this appeal the defendant counsel took an objection as to the inclusion of the defendant's notice of application in the appeal record.

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A [11] In order to decide on this appeal, I have to answer the question which was directed by the previous High Court (in allowing the defendant's earlier appeal against the order of summary judgment entered by plaintiff) for the trial judge to determine that is: what was the market value of the car on the day it was stolen?).

B [12] Before I proceed further, I must say that the defendant's objection to the inclusion of the defendant's application for amendment to the statement of defence to include counterclaim has no merits. In her judgment, the learned Sessions Court Judge had
C allowed the amendment and even entered judgment for the defendant on the counterclaim. See the Court Order of 16 November 2007 at pp. 31-32 of the appeal record. The plaintiff has appealed against the whole decision. This is the appeal.

D **The Defendant's Submissions**

E [13] The sum insured RM120,000 in the Schedule to the policy is not the market value of the car. It merely states the maximum sum payable under the policy. The terms of the basis of settlement – Clause 2(b) section A of the Policy – expressly states the insurers
F have the option to pay either the market value of the vehicle at the time of the loss or the sum insured in the policy whichever is lower. Therefore the burden is on the insured to prove the market value of the car at the time of loss.

G [14] The defendant had produced evidence of the market value of the car at the time of the loss which was RM94,000 as in the final report of the Loss Adjuster, McLaren Saksama (Malaysia) Sdn Bhd and a valuation letter from Federal Auto Cars Sdn Bhd. This value, the defendant contended, is in accordance with the basis of
H settlement as provided under cl. 2 section A of the Policy which is that the value would equal to the cost of purchasing a replacement vehicle of the same make, model and age of the vehicle at the time of loss. If there is dispute as to the value, the value would be determined by the Head Office of the franchise-holder and the valuation (or the one done by loss adjuster licensed under the Insurance Act 1963) will be conclusive evidence in respect of the market value of the insured vehicle in any legal proceedings against the insured.

I [15] It was also submitted for the defendant that the discretion of the learned trial judge to admit into evidence the loss adjuster's report and the letter from Federal Auto Cars Sdn Bhd dated

7 February 2002 as evidence of value should not be interfered with: *New Zealand Insurance Co Ltd v. Ong Choon Lin* [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230 SC; *Vasudevan Vazhappulli Raman v. T Damodaran PV Raman & Anor* [1981] CLJ 84; [1981] CLJ (Rep) 101 FC and *Mahmod Kailan v. Goh Seng Choon & Anor* [1976] 1 LNS 68.

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[16] The defendant also contended that the evidence of PW1 and PW2 of negotiations to sell the car at RM120,000 is not a reflection of market value. It was submitted that under section 2(d) of the policy, the market value for the purpose of the policy is the value determined by the franchise holder head office.

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[17] On the issue of costs, which was ordered by the learned trial judge to be awarded to the defendant from 1 November 2003 ie a date, one day after the High Court had allowed the defendant's appeal against the order of summary judgment obtained by the plaintiff till the date of judgment of this action after full trial ie 16 November 2007, it was submitted that it was correct. The defendant had made a reasonable offer of settlement on a "without prejudice basis" to the plaintiff since 22 February 2002 in the sum of RM93,800 (RM95,000 less the policy excess of RM1,200) and on 25 September 2007 the defendant gave notice of the Calderbank Letter to the plaintiff maintaining the offer of RM95,000 and also asking for a refund of RM37,888.98 being surplus amount paid earlier to plaintiff on 22 January 2003: *Thrimalai Palamiappan & Anor v. Mohamed Masry bin Tukimin* [1986] 1 CLJ 347; [1986] CLJ (Rep) 756 and *Calderbank v. Calderbank* [1975] 3 All ER 333.

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The Plaintiff's Submissions

[18] The burden to prove market value of the car was not on the plaintiff but on the defendant. The learned trial judge erred in placing the onus on the plaintiff to prove the market value of the car was RM120,000. Plaintiff counsel cited ss. 101, 102 and 103 Evidence Act 1950.

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[19] The sum insured of RM120,000 was agreed between the parties as the market value of the car at the time of renewal of the insurance policy on 13 September 2001 and the agreed market value was the very foundation upon which the premium was determined. But the defendant contended the market value of the vehicle one day after it was stolen was not in the sum of RM120,000. Therefore it was submitted that the burden of proving the market value of the car is on the defendant.

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- A [20] The loss adjuster's report and the letter of valuation by Federal Auto Cars Sdn Bhd were wrongly admitted into evidence because they do not comply with contractual requirements set out in the insurance policy. The loss adjuster's report relied on hearsay and inadmissible evidence of value. There is no proper basis or process for valuation which could establish the value of the motor vehicle with any degree of certainty. The Federal Auto Cars Sdn Bhd's letter does not disclose the basis or formula for valuation. In fact the letter contained a disclaimer as to the value stated therein.
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- C [21] The value in the loss adjuster's report and the letter from Federal Auto Cars Sdn Bhd were not based on the personal knowledge of the maker or physical inspection of the car. The loss adjuster who made the market analysis for the purpose of the report was nowhere to be found. Also the car was stolen. So no physical inspection of the car for the purpose of valuation. In this regard the evidence of PW1 and PW2 should be preferred. They have personal knowledge of the car – its actual condition. PW1 inspected the car. She drove it to the mechanic who inspected the car and said that RM120,000 was a fair price. And PW1 was prepared to buy the car for RM120,000. On the other hand the loss adjuster's report and the letter of Federal Auto Sdn Bhd did not have the advantage of seeing the car physically to assess its condition in determining its market value. So their value was purely conjecture. There is no better evidence as to value than that of PW1's evidence. The basis of settlement under condition 2 section A of the Policy may not be applicable. It does not provide for the basis or formula for the valuation where the motor vehicle has been stolen. The plaintiff therefore is entitled to have any ambiguity in the terms of the policy and the cover note interpreted in favour of the plaintiff:
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- G *Malaysia National Insurance Sdn Bhd v. Abdul Aziz Mohamed Daud* [1978] 1 LNS 117.

Opinions Of The Court

- H [22] The car was insured for RM120,000 at the time it was lost due to theft; and theft is one of the situations covered by the motor policy insurance taken by the plaintiff with the defendant in this case. The car was stolen one day after it was insured on a renewal of the insurance policy. These facts are not in dispute. What is in dispute is the market value of the car at the time it was stolen.
- I [23] The plaintiff said it was RM120,000 which is the sum insured. The defendant said it is RM95,000 for a car of the same model, same make and same age in reasonable state of repairs.

[24] To show market value of the car the plaintiff relied on the evidence of PW1 who was also her friend. PW1 had testified that she wanted to buy the car for RM120,000 but the plaintiff was asking for RM125,000. So they had not concluded the deal. But she further testified that negotiation for the right price was still on going then at the time the car was stolen. PW1 testified that she was willing to pay RM120,000 for the car. She said she had test-driven the car and found it in tip top condition. She also said she had taken the car to her mechanic, to whom she normally goes to for repairs of her cars; and the mechanic, she said, agreed with her that RM120,000 was a fair price.

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[25] The car was Volvo 850SE(A) bearing registration No. QKH7362. It was purchased in used condition by the insured from Federal Auto Cars Sdn Bhd Kuching on 16 May 1997 for RM156,000. When the car was re-insured on 13 September 2001 on renewal of the insurance which was about to expire on 16 September 2001 the insured sum was agreed at RM120,000. I said "agreed" because there is no evidence to suggest that the defendant had objected to the insured sum or had suggested any other lower or higher sum. It is also to be noted that between 1997 to 2001 – a space of about four years – the value of the car as reflected by the sum insured had depreciated by about RM36,000. That works out to about RM9,000 per year of depreciation in value. Now in this case the defendant on the evidence of valuation report by DW1 had stated that the market value of the car at the time it was stolen in September 2001 was RM95,000. That means by way of comparison with its purchase price the value of the car had depreciated by about RM61,000 over the same period of about four years. That figure is twice the amount that the defendant had allowed for the depreciation in value of the car when it agreed to renew the insurance.

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[26] So having regards to the above facts why does the insured sum of RM120,000 not be considered as the market value of the car at the time it was lost by theft? The car was lost one day after it was insured; not one year or two years or any other period of time. Surely in a space of one day the value of the car cannot be depreciated by RM61,000 unless of course the car had been involved in a serious accident that caused damage that resulted in its value to be depreciated to that amount.

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- A [27] For the defendant the evidence of market value came in the form of a final report on value by one Wilfred Lim (DW1) the Manager of McLaren Saksama (Malaysia) Sdn Bhd and its Assistant Manager for Kuching Office, Mr. Sulvinder Singh. The report appeared at pp. 126-132 of the appeal record. It is obvious from the
- B report that there was no physical inspection of the car. The car was already stolen by then. It is also obvious from the last paragraph of the report the market value of the car stated therein is based solely on the market value stated in a letter dated 7 February 2002 by
- C Federal Auto Cars Sdn Bhd addressed to DW1 in his capacity as a Manager of McLaren Saksama (Malaysia) Sdn Bhd. The letter can be seen at p. 133 of the appeal record and is produced below for its full impact:

Federal Auto Cars Sdn Bhd (291371-A)

- D Lot 1387, Section 65, KTL D Jalan Tekad,
Bintawa, 93450 Kuching,
P.O. Box 1400, 93728 Kuching.
Telephone : 082-335300 (Aftersales), 332188 (Sales),
332373 (Admin)
- E Fax: 082-333701.

Ref : ADMIN/02/2002
Date : 07 February 2002

Manager

- F McLaren Saksama (Malaysia) Sdn Bhd
Room 107 1st Floor Wisma Bukit Mata Kuching
Jalan Tunku Abdul Rahman
93100 Kuching

- G Dear Sir

Market Value For Volvo 850 SEA - Chassis No VV1LS5106V5-358014

- H Your letter ref: MV/11021/9/01/KG/WL/SS dated 25 January 2002 refers.

The current estimated market value of the said Volvo 850 SEA bearing Chassis No: W1LS5106V5-358014 and Engine No: B525S-00005 is in the range of RM90,000.00 to RM95,000.00 on provision the said vehicle is in reasonably good condition.

- I Please note we disclaim any liabilities on any consequences for the market value given.

Regards.

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Yours faithfully,

Federal Auto Cars Sdn Bhd

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Assistant Aftermarket Manager.

[28] A point to note with regard to the report of value by DW1 and the letter on market value from Federal Auto Cars Sdn Bhd is that they are not prepared by loss adjusters as required under the insurance policy taken by the plaintiff in this case.

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[29] Section A – para 2 of the insurance policy as to basis of settlement for loss or damage to vehicle at p. 95 of the appeal record provides:

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2. Basis of Settlement

(a) We will at Our option

(i) pay the cost of repairs to Your Vehicle, or

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(ii) pay in cash the amount of the loss or damage to Your Vehicle, or

(iii) reinstate or replace Your Vehicle.

(b) The maximum amount We will pay is the market value of Your Vehicle at the time of the loss or the sum insured in the Policy whichever is the lower figure.

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(c) If Your Vehicle shall at the time of happening of any loss or damage (be it partial/total) be insured for a sum less than its market value then. You shall be considered as being Your own insurer for the difference and shall bear the rateable proportion of the loss accordingly. Provided always that this shall not apply unless the market value at the time of the loss exceeds the insured value by 10%.

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(d) The market value of Your Vehicle would be determined in the event of a dispute by the Head Office of the Franchise-holder and this value would be equal to the cost of purchasing a replacement vehicle of the same make, model and age of Your Vehicle at the time of loss.

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- A (e) In the event no Franchise-holder is available for the make of Your Vehicle the market value of the vehicle would be determined by a Loss Adjuster licensed under the Insurance Act, 1963 and its subsequent legislation agreed to by both You and Us.
- B (f) The valuation done by the relevant Head Office of the Franchise-holder or Loss Adjuster licensed under the Insurance Act, 1963 and its subsequent legislation will be conclusive evidence in respect of the market value of Your Vehicle in any legal proceedings against Us.
- C [30] Also to be noted is that Federal Auto Cars Sdn Bhd in its letter as to market value did not provide any explanation as to how it had arrived at the value of RM90,000-RM95,000 stated in the letter. It simply said that it was a 'current estimated market value' and 'on provision the said vehicle is in reasonably good condition'.
- D But what is the basis of this estimate? In the absence of clear basis of arriving at the given estimate, the value stated in the letter is nothing more than a matter of opinion and conjecture without any substance to substantiate it. Since the report by DW1 relied on the Federal Auto Cars Sdn Bhd's letter, it suffered the same defect and
- E attracted the same criticisms.
- F [31] In fact DW2 under cross-examination by plaintiff counsel testified that he obtained the market value of the car from Federal Auto Cars Sdn Bhd and other used car dealers. But he also testified that he would not be able to tell what cars were used as a basis of comparison and he never had the opportunity to examine the car which he was giving a market value to because the car was stolen. He also agreed that normally in fixing a market value for a car, the adjusters would have to see the car. But more importantly under
- G cross examination DW1 testified as follows:
- H I agree that the vehicles to be assessed according to their conditions ie very good, good, fair, average and poor. In this case, if the condition of the car was very good, the valuation of the car would be higher. In my report I said that the price of RM90,000.00 is based on fair state of repair meaning that it is in good working condition. If it is in tip top condition, it would be very good and the value would be higher. The mileage of the car is also relevant. If it is low, it should fall under the category of very good car.

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The value of RM94,000 is our opinion based on the assumption that it was in a fair state of repair. The accessories considered in the assessment would be the standard ones. I did not see the cars which were used as a basis for the valuation.

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[32] The following must be noted with regard to DW1 evidence under cross-examination. He said the report exh. D1 was prepared with by the loss adjuster and he went through the report with the loss adjuster, Mr. Sulvinder Singh. Is this Sulvinder Singh the same person that had signed the report as 'Assistant Manager, Kuching Office'? If so why did he not sign the report as an adjuster? The question therefore is: is Mr. Sulvinder Singh the 'Assistant Manager, Kuching office' a qualified loss adjuster? There is no evidence to say so. I think it is crucial for the defendant to establish this fact since the loss adjuster was never called to testify. According to DW1 the loss adjuster had left the employment of McLaren Saksama (Malaysia) Sdn Bhd and could not be traced. However DW1 himself admitted under cross-examination that he never tried to trace the whereabouts of the loss adjuster. DW1 also said that he obtained market value for the car from other used car dealers as well, besides Federal Auto Cars Sdn Bhd. But the market value from other car users was never put in evidence. Had it been put in evidence would it be prejudicial to the defendant? DW1 also testified as shown above that if the car was in tip top condition it would purchase a higher value than the RM95,000 suggested in his report. He also testified that a car with low mileage is in the category of 'very good' car. In this case the mileage of the car as recorded by DW1 report is 50,000 km. This can be considered low mileage in the circumstances.

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[33] It is true that the learned Sessions Court Judge had exercised her discretion to admit exh. D1 as evidence of market value of the car as well as the letter by Federal Auto Cars Sdn Bhd. It is also the law that the appellate court normally does not interfere with the exercise of discretion unless such exercise is found to be not supported by facts and circumstances of the case or it is wrong in law or it is unreasonable for some other reasons. However having admitted into evidence it does not mean that the evidence is conclusive and the reliance on it by the trial court cannot be questioned by the appellate court. The appellant court may review the evidence of D1 and may disagree with the trial judge as to its probative value as evidence of fact to be proved at the trial.

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A [34] In this instant case the learned trial judge had not judiciously appreciated the fact that DW1 and Federal Auto Cars Sdn Bhd had not seen the car physically before making the assessment. She also failed to appreciate that the basis of comparison was not stated either in report D1 or the letter by Federal Auto Cars Sdn Bhd.

B [35] In my opinion the evidence of the market value of the car must be seen in the light of the evidence by PW1 and PW2 who had seen the car before it was stolen and who had also test driven the car so much so that PW1 was willing to buy the car at
C RM120,000. To me this is the real market value. That is the price that a willing buyer and willing seller will trade at arms length. In this instant there is no evidence to show that there was collusion between PW1 and PW2 as to the evidence of negotiation for the sale of the car by PW2 to PW1 just before it was stolen. To me
D this is the better evidence compared to the report by DW1 which was based on conjectures and mere opinion.

E [36] It is also true that the insurance policy in this case is not a valued policy. But that does not mean that insured value cannot be the market value if there is evidence to support it. The defendant itself agreed that the insured sum is the maximum they could pay under the policy. In this instant case the evidence of PW1 and PW2 is the evidence of a value by a willing seller and willing buyer. So why could it not be accepted as evidence of value of the car at the time it was stolen? I see no reason to reject their evidence as being
F unreasonable or untrue. Therefore it is my finding that the market value of the car at the time it was stolen was RM120,000.

[37] For the above reasons, I will allow this appeal.

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